THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM, Respondents, v. MORGAN STANLEY DW INC., and KIMBERLY ANN BLINDHEIM, Petitioners.	NO. 82311-1 PETITIONERS' THIRD STATEMENT OF ADDITIONAL AUTHORITIES C/A NO. 60115-6-I

COME NOW the Petitioners Morgan Stanley DW Inc. and Kimberly Anne Blindheim and submit the following additional authorities to the Court pursuant to RAP 10.8:

The following authority published by NASD and in effect at the time the arbitrators issued their award in the above-referenced matter pertains to the issue of whether NASD arbitrators possess authority to dismiss claims based upon applicable statutes of limitations. *See* Public Investors Arbitration Bar Association ("PIABA") Amicus Brief at 3-8.

1. *Arbitrator Training Chairperson's Course Preparation Guide* prepared by NASD Regulation Office of Dispute Resolution, at 61

(November 1996) (relevant portions attached hereto as Exhibit 1) (emphasis in original): "**Statute of Limitations**: Even when a claim is filed within the six-year eligibility period provided in the Code, Federal or State law may still preclude a monetary award for events in that same period of time. This time limit – or statute of limitations – could fall anywhere from one year to six years depending on the type of allegations and the district where the claimant filed his or her hearing request. The statute of limitations refers to a prescribed time limit after which a cause of action or claim may not be brought. If the arbitration is brought after the statute of limitations has run and the time period cannot be tolled (extended), the claim should be dismissed with prejudice. … *Even if a case is eligible for arbitration under the six-year eligibility standard, you should still dismiss it if it fails to comply with a state or federal statute of limitations deadline.*"

2. *NASD Arbitrator Training Panel Course Preparation Guide* v1.3, at 72-32 (2005) (relevant portions attached hereto as Exhibit 2): "Statutes of Limitations: Even when a claim is filed within the six-year eligibility period provided in the Code, federal or state law may still preclude a monetary award for events in that same period

of time, or a shorter period. This time limit – or statute of limitations – depends on the type of allegations and the applicable jurisdiction. The statute of limitations refers to a prescribed time limit after which a cause of action or claim may not be brought. If the arbitration is brought after the statute of limitations has run and the time period cannot be tolled (extended), the claim should be dismissed with prejudice."

The following authority pertains to the issue of whether other state courts apply a pure "error of law" standard of review on the face of the award. *See* Respondent Brooms' Revised Second Statement of Additional Authorities.

3. *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 54, 911 N.E.2d 1201 (Ill. App. 2009): "'To vacate an award based on a gross error of law, a reviewing court must be able to conclude from the award's face, that the arbitrator was so mistaken as to the law that, if apprised of the mistake, he would have acted differently.' *Herricane*, 354 Ill. App. 3d at 156. 'Gross errors in judgment or gross mistakes of law or fact are not grounds for vacating an award unless the errors are apparent upon the face of an award.' *Herricane*, 354 Ill. App. 3d at 156. 'The burden is placed on the

challenger to prove by clear and convincing evidence that an award was improper.' *Herricane*, 354 Ill. App. 3d at 156."

4. *Rauh v. Rockford Products Corp.*, 143 Ill.2d 377, 391, 574 N.E.2d 636 (Ill. 1991): "In *Garver*, this court looked to section 12(a)(3) of the Act (Ill. Rev. Stat. 1975, ch. 10, par. 112(a)(3)), and held that an arbitrator's award will not be set aside for errors in judgment or mistakes of law or fact. (*Garver*, 76 Ill. 2d at 7-8.) This holding accords with long-established case law regarding arbitration agreements. *Burchell v. Marsh* (1855), 58 U.S. (17 How.) 344, 349, 15 L. Ed. 96, 99; *Ross v. Watt* (1854), 16 Ill. 99, 102; *White Star Mining Co. v. Hultberg* (1906), 220 Ill. 578, 609; *Podolsky v. Raskin* (1920), 294 Ill. 443, 450."

5. *Masse v. Commercial Union Ins. Co.*, 134 N.H. 523, 525, 593 A.2d 1164 (N.H. 1991): "In New Hampshire, an arbitrator's decision may either be corrected or modified by the superior court upon a showing of 'plain mistake' by the arbitrator. RSA 542:8; *Rand, supra* at 771, 571 A.2d at 284. 'To constitute plain mistake, the error must be one which is apparent on the face of the record and which would have been corrected had it been called to the

arbitrator's attention.' *Rand supra.* The plaintiffs must demonstrate that the arbitrator had 'manifestly fallen into such an error with regard to facts or law . . . as must have prevented the free and fair exercise of [his] judgment upon the subject submitted to [him].' *Sanborn v. Murphy*, 50 N.H. 65, 69 (1870), *quoted in Rand supra.*"

6. *Tretina Printing, Inc. v. Fitzpatrick & Asso., Inc.*, 135 N.J. 349, 358, 640 A.2d 788 (NJ 1994): The majority adopted the following language from the Chief Justice's concurring opinion in another case. "'Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in *[N.J.S.A.* 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision

only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.'"

7. *Anthony v. Kaplan*, 324 Ark. 52, 57-58, 918 S.W.2d 174 (Ark. 1996): "As a matter of public policy, arbitration is strongly favored, and is looked upon with approval by courts as a less expensive and more expeditious means of settling litigation and relieving docket congestion. *Lancaster v. West,* 319 Ark. 293, 891 S.W.2d 357 (1995); *Estate of Sandefur v. Greenway,* 898 S.W.2d 667 (Mo. App. W.D. 1995). . . . Further, it is not for the courts to determine if the arbitrators decided the dispute correctly, only that the arbitrators acted within their jurisdiction. *Id.* The failure of the arbitration panel to follow the law as a court of law or equity would have done, without specific agreement to such in the arbitration agreement, does not afford relief through the courts. *Id.; Stifel, Nicolaus & Co. v. Francis,* 872 S.W.2d 484 (Mo. App. W.D. 1994); *Maross Const. Inc. v. Central N.Y. Regional Transp.*

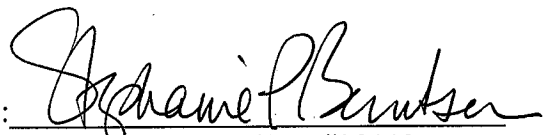
Authority, 66 N.Y.2d 341, 488 N.E.2d 67, 497 N.Y.S.2d 321 (N.Y. 1985)."

8. *Mandl v. Bailey*, 159 Md. App. 64, 93, 858 A.2d 508 (Md. App. 2004): "Under the tightly restricted scope of circuit court review of an arbitrator's decision under the MUAA, factual findings by an arbitrator are virtually immune from challenge and decisions on issues of law are reviewed using a deferential standard on the far side of the spectrum away from a usual, expansive *de novo* standard. *See MCR, supra*, 148 Md. App. at 120 (quoting *Upshur Coals Corp. v. United Mine Workers of America*, 933 F.2d 225, 229 (4th Cir. 1991)). *See also Baltimore Teachers Union, supra*, 108 Md. App. at 181. An arbitrator's mere error of law or failure to understand or apply the law is not a basis for a court to disturb an arbitral award. *MCR, supra*, 148 Md. App. at 120 (quoting *Southern Md. Hosp. Center v. Edward M. Crough, Inc.*, 48 Md. App. 401, 407, 427 A.2d 1051 (1981)). Only a completely irrational decision by an arbitrator on a question of law, so extraordinary that it is tantamount to the arbitrator's exceeding his powers, will warrant the court's intervention. *See* CJ §§ 3-223 and 3-224; *Rourke v. Amchem Prods. Inc.*, 153 Md. App. 91, 129, 835

A.2d 193 (2003) (quoting *O-S Corp. v. Samuel A. Kroll, Inc.*, 29 Md. App. 406, 409, 348 A.2d 870 (1975)); *MCR, supra*, 148 Md. App. at 106; *Southern Md. Hosp. supra*, 48 Md. App. at 409."

RESPECTFULLY SUBMITTED this 2nd day of February, 2010

SCHWABE, WILLIAMSON & WYATT, P.C.



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DECLARATION OF SERVICE

I, Stephanie P. Berntsen, hereby certify that I mailed a copy of the foregoing PETITIONERS' THIRD STATEMENT OF ADDITIONAL AUTHORITIES to the following parties via United States first-class mail with postage prepaid on the 2nd day of February, 2010:

Michael T. Schein Kevin P. Sullivan Sullivan & Thoreson 701 5th Ave., Suite 4600 Seattle, WA 98104-7068 Of Attorneys for Respondents	David Paltzik, Esq. Greenberg Traurig, P.A. 2375 E. Camelback Road, Suite 700 Phoenix, AZ 85016 Bradford D. Kaufman, Esq. Jason M. Fedo, Esq. Greenberg Traurig, P.A. 777 S. Flagler Drive, Suite 300 East West Palm Beach, FL 33401 Ira Hammerman Kevin Carroll Securities Industry 11001 New York Ave. NW Washington, DC 20005 Of Attorneys for Amicus The Securities Industry and Financial Markets Association for Justice Foundation

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CERTIFICATE OF FILING

I, Stephanie P. Berntsen, hereby certify that I filed the original and one copy of the foregoing PETITIONERS' THIRD STATEMENT OF ADDITIONAL AUTHORITIES on the Clerk of the Washington Supreme Court, 415 12th Ave SW, P.O. Box 40929, Olympia, WA 98504-0929, via UPS Overnight on the 2nd day of February, 2010, with postage prepaid.

SCHWABE, WILLIAMSON & WYATT, P.C.

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EXHIBIT 1

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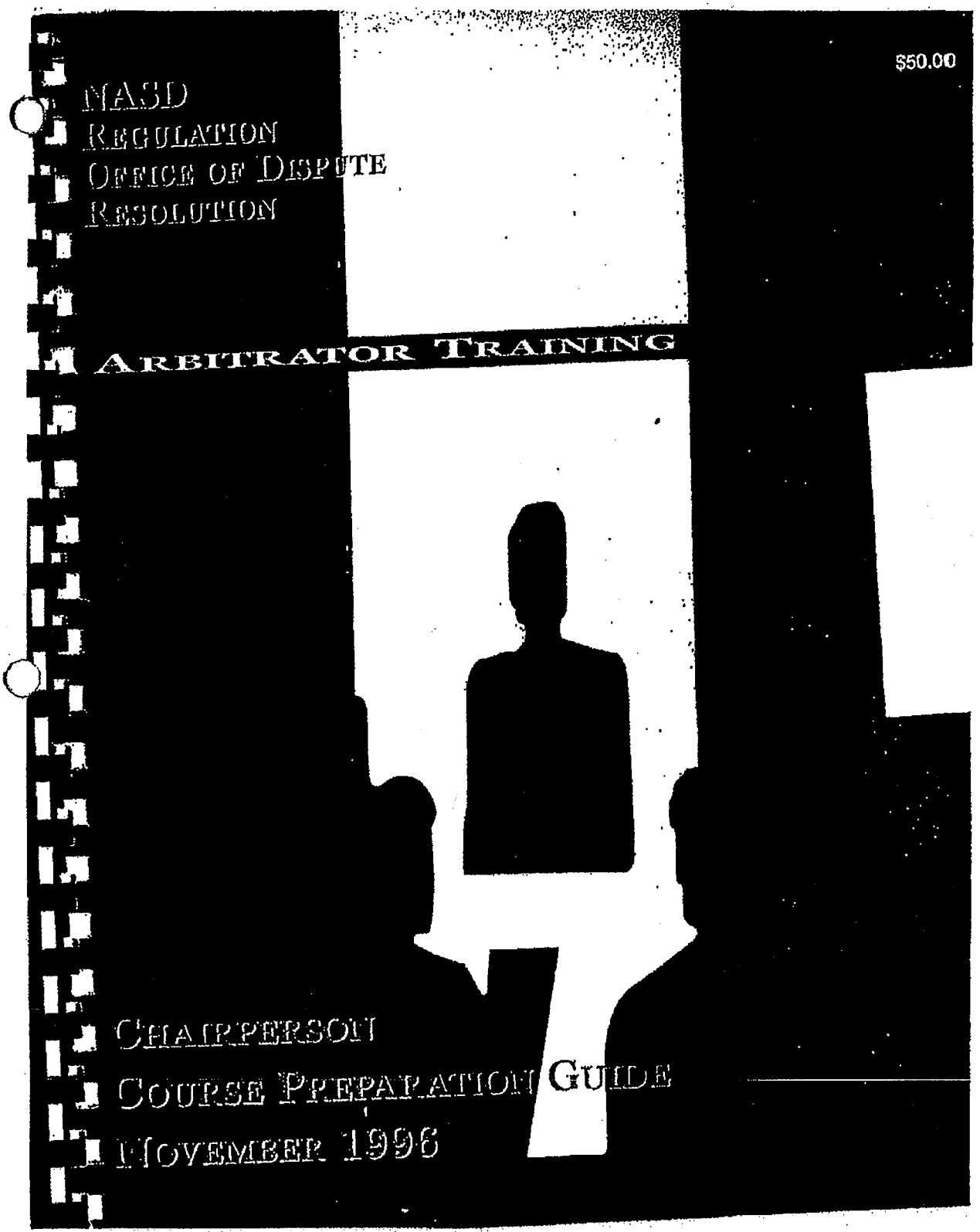
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NASD
Regulation
Office of Dispute
Resolution
Arbitrator Training
Chairperson
Course Preparation Guide
November 1996

The panel should review Rule 10304, the pleadings, motions, and responses. If your authority to judge the case is unclear, ask the parties to brief the issue further.

Of course, once the panel has made its ruling, inform NASD Regulation of your decision.

In addition to eligibility, another dispositive issue you may see involving filing dates is a statute of limitations. We'll review this topic next.

Statutes of Limitations

Even when a claim is filed within the six-year eligibility period provided in the Code, Federal or State law may still preclude a monetary award for events in that same period of time.

This time limit—or statute of limitations—could fall anywhere from one year to six years depending on the type of allegations and the district where the claimant filed his or her hearing request.

The statute of limitations refers to a prescribed time limit after which a cause of action or claim may not be brought. If the arbitration is brought after the statute of limitations has run and the time period cannot be tolled (extended), the claim should be dismissed with prejudice. Tolling, or the extension of the statute, could occur where you find fraudulent concealment

Even if a case is eligible for arbitration under the six-year eligibility standard, you should still dismiss it if it fails to comply with a state or federal statute of limitations deadline.

Statutes of limitation can be tolled (extended) either by law or equity. For example, a statute of limitations may be extended if there's evidence of a continuing misrepresentation.

Just as we saw with issues of eligibility, respondents will generally ask NASD Regulation in its answer to dismiss a case based on the relevant statute of limitations. NASD Regulation then informs the requesting party that because the motion is substantive and dispositive, it must be heard by the entire panel.

Let's look at an example.

Jack Nash filed an arbitration on April 23, 1996, tered representative Robert Jones negligently mi in a transaction made on April 27, 1990.

EXHIBIT 2

EXHIBIT 2

NASD Arbitrator Training

Panel Course Preparation Guide

v1.3

In situations where investors have signed predispute arbitration agreements, but file their claims in court *first*, the Rule will:

- ✘ Permit member firms to request that the court compel arbitration *provided* all claims, ineligible and eligible, are sought to be compelled to arbitration and, once all claims are filed in arbitration, preclude any eligibility challenges.
- ✘ Permit member firms to challenge claim eligibility where the court compels the arbitration of the claims on request of the investor plaintiffs.
- ✘ Permit member firms to request court dismissal of investor-plaintiff claims on substantive statute of limitation grounds.

In addition to eligibility, another dispositive issue you may see is statute of limitations. We'll review this topic next.

Statutes of Limitations

Even when a claim is filed within the six-year eligibility period provided in the Code, federal or state law may still preclude a monetary award for events in that same period of time, or a shorter period.

This time limit—or statute of limitations—depends on the type of allegations and the applicable jurisdiction.

Statutes of limitation can be tolled (extended) either by law or equity. For example, a statute of limitations may be extended if there's evidence of a continuing misrepresentation.

The statute of limitations refers to a prescribed time limit after which a cause of action or claim may not be brought. If the arbitration is brought after the statute of limitations has run and the time period cannot be tolled (extended), the claim should be dismissed with prejudice. Tolling, or the extension of the statute, could occur where you find fraudulent concealment.

Just as we saw with issues of eligibility, respondents may ask NASD Dispute Resolution in its answer to dismiss a case based on the relevant statute of limitations. NASD Dispute Resolution then informs the requesting party that because the motion is substantive and dispositive, it must be heard by the entire panel.

Let's look at an example.

Jack Nash filed an arbitration on April 23, 1996, alleging that registered representative Robert Jones negligently misrepresented the risk in a transaction made on April 27, 1990.

Although the transaction is eligible for arbitration, assume for the moment that respondent's counsel argues that the state's statute of limitations has passed because negligence against a broker must be brought within two years of a transaction.

What steps would you take to determine whether the panel should dismiss the claim?

_____

_____

_____

After reading the pleadings, motions, and applicable statutes, the panel should attempt to identify the appropriate limitation period for the claims. (For example, the limitation period might be two years for negligence and six years for fraud.)

If the issues or facts are clear, should the panel rule? What steps would you take if the issues or facts are unclear?

_____

_____

_____

If the issues and law are clear, the panel should rule and inform NASD Dispute Resolution of its findings. If the issues or law are unclear, the panel should reserve its ruling until additional information is provided by the parties.

In addition to time limitations placed on individuals to file their claims, you may be called on to dismiss a claim because arbitration is not the appropriate forum. We'll review this type of motion next.